

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VAN CHESTER THOMPkins, JR.,

Defendant-Appellant.

UNPUBLISHED

February 3, 2004

No. 242478

Oakland Circuit Court

LC No. 2001-178216-FC

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

The jury convicted defendant of first-degree murder, MCL 750.316, assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and three counts of possession of a firearm during commission of a felony, MCL 750.227b. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent prison terms of natural life without parole for the first-degree murder conviction, twenty-five to forty years for the assault conviction, and four to ten years each for the felon in possession and CCW convictions, to be served consecutive to three concurrent two-year terms for the felony-firearm convictions.

The jury convicted defendant for shooting Samuel Morris to death and for the non-fatal shooting of Frederick France. Defendant appeals as of right, and we affirm.

I. Defendant's Statements to the Police

Defendant argues that the trial court erred by denying his motion to suppress his statements to the police. Defendant asserts that the police improperly continued to interrogate him after he "implicitly" invoked his right to remain silent by failing to answer the officers' questions. See *People v McReavy*, 436 Mich 197, 218; 462 NW2d 1 (1990). We disagree.

The record discloses that defendant was advised of his *Miranda*¹ rights and, according to the interrogating officer, verbally acknowledged that he understood those rights. Contrary to defendant's argument, the record does not demonstrate that defendant asserted his right to remain

¹ *Miranda v Arizona*, 384 US 436, 477; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

silent. Although defendant refused to sign the advice of rights form, he continued to talk with the officer, albeit sporadically. He answered questions with brief responses, or by nodding his head, but never said he did not want to talk or that he was not going to say anything. “When a defendant speaks after receiving *Miranda* warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant of a right to remain silent.” *McReavy, supra* at 222. The trial court did not clearly err in concluding that defendant voluntarily waived his right to remain silent and that he did not subsequently invoke his right to silence. *People v Bender*, 452 Mich 594, 604-605 n 9; 551 NW2d 71 (1996); *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000). Defendant’s statements were properly admitted into evidence.

II. Prosecutorial Misconduct

Defendant also maintains that the prosecutor’s conduct denied him a fair trial. Prosecutorial misconduct issues are decided case by case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court must consider the prosecutor’s conduct in context to determine whether it denied the defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). However, “appellate review of allegedly improper conduct by the prosecutor is precluded if the defendant fails to timely and specifically object; this Court will only review the defendant’s claim for plain error.” *Schutte, supra*.

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. “It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence.” [*People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citations omitted).]

To the extent it was improper for the prosecutor to introduce evidence of codefendant Purifoy’s criminal conviction, see *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982), defendant’s substantial rights were not affected because the defense asserted that Purifoy was the shooter and that the evidence of Purifoy’s conviction linked Purifoy to the gun. Further, the evidence did not show that codefendant Woodward was convicted in this matter. Therefore, this unpreserved issue did not prejudice defendant and, thus, does not warrant reversal.

Moreover, the prosecutor’s rebuttal arguments were responsive to the defense arguments and did not shift the burden of proof to defendant. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Also, it was not improper for the prosecutor to comment on defendant’s refusal to write out a statement during his police interrogation. A prosecutor properly may comment on a defendant’s behavior and demeanor during a custodial interrogation. *McReavy, supra* at 221.

Similarly, it was not plain error for the prosecutor to question Purifoy regarding the contents of the letters that defendant sent to him in prison, or to draw inferences from the absence of certain statements in those letters. *Fields, supra* at 115.

Further, for the most part, the prosecutor's comments directed at defense counsel did not amount to an improper personal attack designed to shift the jury's focus to counsel's personality. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996). To the extent it was improper for the prosecutor to suggest that defense counsel would have presented a different story if the surveillance tape did not exist, the remark did not deny defendant a fair trial and a cautionary instruction, had one been requested, could have cured any resulting prejudice. Therefore, this issue does not require reversal. *Schutte, supra*.²

Additionally, we are not persuaded that reversal is required because of the prosecutor's questioning of Tomika Stephens or Detective Helgert. Where Stevens testified that she was defendant's girlfriend for six years, the prosecutor was permitted to examine her concerning the extent of her relationship and familiarity with defendant. To the extent the prosecutor's questioning of these witnesses suggested defendant's possible involvement in other criminal activities, we conclude that his substantial rights were not affected where the questioning did not directly refer to other specific crimes. Further, it was undisputed that defendant possessed several pieces of false identification when he was eventually arrested and the testimony suggesting defendant's possible involvement in other activities provided an alternative explanation for the false identifications apart from suggesting that they were attributable to defendant's involvement in the charged offense here. Accordingly, this unpreserved issue does not warrant reversal.

Though we agree that the prosecutor made an improper appeal to sympathy in his opening statement, *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001), the remark was brief and isolated, and the court's instruction to the jury that it could not let sympathy influence its decision was sufficient to cure any prejudice. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, this unpreserved issue does not warrant reversal.

III. Effective Assistance of Counsel

Defendant says that he was denied the effective assistance of counsel and that the trial court erred in denying his motion for an evidentiary hearing on this issue. To establish a claim of ineffective assistance of counsel, the burden is on the defendant to show that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is

² Defendant also waived any error involving Purifoy's letters when he argued for their admission, *People v Riley*, 465 Mich 442, 448; 636 NW2d 514 (2001); *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995), and the prosecutor's argument that the various witnesses consistently identified defendant as the shooter was supported by the evidence and, therefore, was not improper.

a strong presumption that counsel's conduct was reasonable. *Id.* This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999); *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

"If the record made before a defendant is convicted does not factually support claims he wishes to urge on appeal, he should move in the trial court for a new trial . . . and seek to make a separate record factually supporting the claims." *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Here, we agree that further development of the record is not required in order to resolve defendant's claims and, therefore, remand for an evidentiary hearing is not necessary. See also MCR 7.211(C)(1)(a)(ii).

Defendant argues that defense counsel was ineffective for failing to object to the prosecutor's alleged misconduct. For the most part, we found that the prosecutor's conduct was not improper and, to the extent some of the prosecutor's conduct could be viewed as improper, it did not affect the outcome. Therefore, defendant was not prejudiced by counsel's failure to object to these matters.

Also, defense counsel's decisions to stipulate to certain items were matters of trial strategy and defendant has not overcome the presumption of sound strategy. *Avant, supra*; *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). We will not second-guess counsel's decisions.

We also agree with the trial court that defendant was not prejudiced by defense counsel's failure to request certain jury instructions. Although the court did not specifically instruct the jury that it could consider Purifoy's conviction only for purposes of his credibility, the record does not disclose an attempt to argue that conviction for an improper purpose. Further, defendant was not prejudiced by counsel's failure to ask for an instruction that Omar Stephen's prior conviction for a theft crime could be used for purposes of determining his credibility, considering that there was substantial evidence presented questioning his reliability and credibility as a witness. Nor was defendant prejudiced by counsel's failure to request a limiting instruction that defendant's prior felony conviction could be considered only for purposes of the felon in possession charge. The record does not reveal an attempt to argue that conviction for an improper purpose.

Defense counsel's stipulation that defendant had a prior, undisclosed felony conviction for purposes of the felon in possession charge and the trial court's instructions concerning that offense were sufficient to safeguard defendant's rights. Counsel was not ineffective for failing to request additional instructions. *Green, supra*.³

³ Defense counsel's decision to use the Purifoy letters was a matter of trial strategy, which we will not second-guess, *Avant, supra*; also, we agree with the trial court that defense counsel sufficiently attacked Omar Stephen's credibility. Defendant has not shown that counsel's efforts

(continued...)

For the foregoing reasons, defendant has failed to establish that he was denied the effective assistance of counsel.

IV. Identification Testimony

Defendant asserts that the trial court erred in denying his motion to suppress his identification by the surviving victim. “In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification.” *People v Kurczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

Contrary to defendant’s argument, the record does not disclose that a photographic showup was conducted at the hospital on the morning after the shooting. Rather, the record indicates that the victim identified defendant from a series of surveillance photos that were taken at the location where the events surrounding the offense began. Although a photographic showup was subsequently conducted, the victim *did not* identify defendant at that showup.⁴ There was also evidence that the victim participated in a second photographic showup, but it did not include defendant’s picture and the victim failed to identify anyone. Because defendant was not identified in either of these two later photographic showups, there was no identification evidence to suppress, nor any basis for suppressing the victim’s in-court identification.⁵

The trial court did not error in denying defendant’s motion to suppress the victim’s identification testimony.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kirsten Frank Kelly

(...continued)

in this regard were deficient. And, defendant has not shown that he was improperly interviewed in violation of his right to counsel.

⁴ The victim explained later that he did not identify defendant at this time because the photo of defendant was an older one, taken when defendant was a juvenile, with a different hairstyle.

⁵ Because defendant was not in custody, we find no merit to defendant’s claim that the photographic showups were improperly conducted in the absence of counsel. *Kurczyk*, *supra* at 302.